



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Britam General Insurance Co (K) Limited v Mwaniki (Civil Appeal
E353 of 2023) [2025] KEHC 6171 (KLR) (10 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 6171 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E353 OF 2023
DO CHEPKWONY, J
APRIL 10, 2025**

BETWEEN

BRITAM GENERAL INSURANCE CO (K) LIMITED APPELLANT

AND

JOHN NDUNG’U MWANIKI RESPONDENT

*(Being an Appeal from the Ruling of Hon. P. M. Mugure (PM) delivered
on 6th September, 2023 in Limuru MCCC NO.e042 of 2023, John
Ndungu Mwaniki –vs- Britam General Insurance Company (K) Limited)*

JUDGMENT

1. This Appeal emanates from the Ruling of Hon P.M Mugure delivered on 6th September, 2023 in Limuru MCCC No. E042 of 2023. The facts being that the Respondent herein, who is the Plaintiff in the lower court case, filed the suit against the Appellant (the Defendant in the said case) vide a Plaint dated 10th February, 2023 and was seeking orders that:
 - a. A declaration that the Defendant is under legal obligation to settle the decretal sum in Civil suit No. 163 of 2019 at Limuru and other damages incurred in pursuit of that suit currently standing at Kshs. 449,699/=.
 - b. Costs of the suit.
 - c. Interest on (a) and (b) above at court rates.
2. In response to the claim, the Appellant filed a Statement of Defence dated 1st March, 2023, together with a Notice of Preliminary Objection dated 29th March, 2025 wherein it raised among other grounds that the suit before the lower court was not founded on any provisions of law hence it was bad in law and incurably defective.



3. The Plaintiff/Respondent filed a Notice of Motion dated 18th April, 2023 seeking to have the Defence struck out and Judgment be entered as sought in the Plaint. This Application culminated into a Ruling delivered by the trial court on the 6th September, 2023 wherein the trial court dismissed the Notice of Preliminary Objection citing no triable issues and thus proceeded to allow the Respondent's application dated 18th April, 2023 as prayed.
4. Being aggrieved by the Ruling of the trial court, the Defendant/Appellant lodged the present appeal through a Memorandum of Appeal dated 15th September, 2023 raising the following grounds:
 - a. THAT the Learned Magistrate erred in law and in fact in Failing to appreciate that the suit against the Defendant/Appellant was not founded on any provisions of law.
 - b. THAT the Learned Magistrate erred in law and in fact in failing to consider that the Plaintiff's claim in the original suit being LIMURU CIVIL SUIT NO. 163 OF 2019 was for material damage and that the material damage claims are not covered under the provisions of Insurance (Motor Vehicle Third Party Risks) Act.
 - c. THAT the Learned Magistrate erred in law and in fact in failing to consider the provisions of Insurance (Motor Vehicle Third Party Risks) Act.
 - d. THAT the Learned Magistrate erred in law and in fact in failing to consider the Appellant's submissions and the authorities cited and thereby arrived at an erroneous conclusion.
5. On 20th April, 2024, this appeal was certified ready for hearing and on 18th October, 2024 this court directed that the appeal be canvassed by way of written submissions. The parties complied and filed their respective submissions for consideration.
6. In its submissions dated 2nd December, 2024, the Appellant highlighted the following three issues for determination, being:-
 - i. Lack of statutory foundation for the claim.
 - ii. The specific limitation of cap 405 regarding material damage claims.
 - iii. The Appellant's submissions and cited authorities.
7. It is the Appellant's argument that the Respondent's claim in the original suit was for material damage which are not covered under the provisions of Insurance (Motor Vehicle Third Party Risks) Act. It argues that the provisions of the Act only cover liability in cases of death and bodily injuries and not material damages. He has relied on the case of David Kinyanjui & 2 Others vs Meshack Omari Monyori [1988]eKLR .
8. The Appellant argues that the trial court also ignored the fact that the Preliminary Objection had been raised on a pure point of law which it had met as it overlooked the fact that it lacked jurisdiction under the Act and thus the Ruling was an error in law. The Appellant further contends that the trial court failed to consider its submissions and authorities cited which resulted into a flawed ruling. The Appellant has thus urged that the court to allow the appeal and grants the reliefs sought.
9. In the Respondent's submissions dated 16th December, 2024, he argues that the only time that magistrate court can deal with a declaratory suit is when the declaration sought is covered under Section 10 (1), (2) and (4) of the Act which specifically allows that a third party who suffered personal injuries and or death from a road traffic accident brings a declaratory claim against the insurer of the offending motor vehicle if he or she is not compensated in the primary suit.



10. The Respondent holds that the power of the magistrate court to make declaratory orders is not only founded on Cap 405, Laws of Kenya to the exclusion of other Acts. He has relied on the [Civil procedure Act](#) to hold that a magistrate court can make a declaratory order based on any losses incurred by a Third party and not necessarily on personal injury claims.
11. The Respondent has further claimed that the primary suit was not only anchored on Cap 405, Laws of Kenya but insurance contract that existed at the time of the accident. He thus argues that the Appeal is not merited and same should be dismissed with costs to the Respondents.

Analysis and Determination

12. It is trite that the duty of the Appellate court is as was stated in the case of Abok James Odera T/A A.J Odera & Associates –vs- John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where it was held that:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

13. In the celebrated case of Selle & Another –vs- Associated Motor Boat Co. Ltd. & Others [1968] EA 123, this duty was further reiterated the following terms:-

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif – vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”

14. This Court has considered the grounds cited in the Memorandum of Appeal, the submissions filed by each party and authorities relied on by the parties in support and opposition to the Appeal. It is the court’s finding that the main ground of appeal is whether the trial court erred in his Ruling and holding that it had jurisdiction to issue declaratory orders owing to the fact the claim was one for material damage.

15. On the applicability of the law, Section 5 and 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya provide an answer to the questions raised in this appeal.

16. In the first instance, Section 5(b) of the said Act provides: -

“In order to comply with the requirements of section 4, the policy of insurance must be a policy which insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road.”



17. On its part, Section 10 of the said Act provides as follows: -

“Duty of insurer to satisfy judgments against persons insured

- (1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in Section 5 (b) prescribed in respect thereof in the Schedule.”

18. According to the Appellant it holds that its policy did not cover material damages. However, it did not provide any evidence to this effect and relies on the holding in the case of Jubilee Insurance Co Ltd v Walter Tondo Soita (2021) eKLR, where the court faced with similar circumstances, held as follows:

“If the Appellant wanted the Court to believe that material damage is not covered by the policy, it was duty bound to adduce evidence for the court to find in its favour.”

19. Therefore, since no sufficient evidence or proof that the subject, that is, its policy did not cover material damages as alleged, this Court finds that the trial court was justified in concluding that the defence filed had not raised triable issues. Consequently, the Court finds that there is sufficient ground advanced to warrant the interference with the trial Court’s decision.

20. In the circumstances, without any evidence adduced, the court finds that the instant appeal lacks merit and proceeds to dismiss it with costs to the respondent.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 10TH DAY OF APRIL __, 2025.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Kirui counsel for Appellant

Court Assistant - Martin

